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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MARCOS MARIO VEGA on Habeas Corpus.	B210675 (Los Angeles County Super. Ct. Nos. A464527, BH005267)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus, Steven R. Van Sicklin, Judge. Petition granted.

Marcos Mario Vega, in pro. per.; and Richard Darington Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Linnea D. Piazza, Deputy Attorney General, for Respondent.

In 1985, Marcos Vega was sentenced to a term of 25 years to life for first degree murder and assault with a deadly weapon.[1] In June 2007, the Board of Parole Hearings (Board) found Vega suitable for parole and calculated his release date as 2010. Governor Arnold Schwarzenegger reversed the Board's decision in October 2007.[2] Vega has filed a petition for a writ of habeas corpus, contending that he has been denied due process because no evidence supports the Governor's conclusion that Vega would currently pose an unreasonable risk of danger to public safety if released on parole. We agree and grant the petition.

BACKGROUND

A. Commitment Offense

The following facts are drawn from the Court of Appeal's opinion affirming Vega's conviction. (*People v. Vega* (Aug. 1, 1986, B016026) [nonpub. opn.].)

On December 9, 1984, 16-year-old Yvonne Morehead and her newborn baby were living with Yvonne's mother, Lydia Morehead, in Bell. Although 18-year-old Vega, the baby's father, had lived with Yvonne in the apartment after their baby was born, he was not living there on December 9. Their relationship was contentious. Yvonne would later tell a detective that Vega had said that if he ever caught her on a date, "'he would kill [him] and then get her.'" (*People v. Vega*, *supra*, B016026.) She also said Vega had beaten her in the past.[3]

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[1] The court stayed the deadly weapon enhancement and ordered the sentence for assault with a deadly weapon to run concurrently with the murder sentence.

[2] The Governor referred to his "2005 decision reversing the Board," but neither his decision nor the transcript of the parole suitability hearing is part of the record before us. In any event, it appears Vega had been found suitable for parole once before.

[3] At trial, Yvonne denied telling the detective that Vega had beaten her 15 times but admitted that he had struck her on approximately five occasions with his open hand.

On December 9, Yvonne spoke with Vega during the day and invited him to visit her later that night. Instead, and unbeknownst to Vega, she went to a movie with victim Robert Garcia and another couple, Mary Bazan and victim Raymond Sandoval.

Lydia arrived back at her apartment about 10:00 p.m. and let Vega wait there for Yvonne. Lydia told Vega that Yvonne was out with her father, but Vega "'just shook his head like he didn't believe it.'" (*People v. Vega*, *supra*, B016026.)

Vega sat in a chair by the window, drinking a beer while he waited for Yvonne to return. After about a half hour, he moved to the couch to watch television and fell asleep. He awoke around 2:30 a.m. and decided to make himself some french fries. As he was selecting a knife in the darkened kitchen, he heard a car drive up. He looked outside and saw Yvonne kissing another man. He claimed he felt "'Anger. Just feeling like killing.'" (*People v. Vega*, *supra*, B016026.)

Yvonne testified that Vega ran toward them with a crazy look on his face, and she jumped back into the car. Vega managed to grab Garcia, and the two struggled.[4] Vega chased Garcia behind a dumpster, and Yvonne lost sight of them. Vega claimed he did not know whether he stabbed Garcia or not.

Vega returned to the car and tried to open the door. Yvonne saw a knife in his hand, inches from Sandoval's face. Vega pulled Yvonne from the car by her hair and dragged her toward the house. Lydia, who had been awakened by her daughter's screams, ran downstairs and saw Vega about to strike Yvonne. Lydia called Vega's name, and he ran out the door.

Garcia bled to death from the stab wound to his thorax. A small triangular piece of metal was removed from a second smaller stab wound in Garcia's armpit area. The piece of metal matched the broken tip of one of Lydia Morehead's knives.

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[4] The detective testified that Yvonne told him that when Vega was attacking Garcia, Vega shouted several times, "'I'm going to kill you.'" (*People v. Vega*, *supra*, B016026.) At trial, Yvonne denied hearing Vega say anything.

Vega turned himself in. He pleaded not guilty and was convicted in a court trial. He was then sentenced as noted.

B. Social History

Vega was born in 1966 in East Los Angeles, the oldest of four children. He was raised by both parents until he moved in with his girlfriend Yvonne, whom he later married. Vega and Yvonne had two children, a son and a daughter. Vega and Yvonne divorced in 1991. His father died in 1994; his mother still lives in Los Angeles County and works as a beautician. Vega's daughter lives with his mother and works at a bank. Vega remains in close contact with his family through phone calls, letters, and visits. His sister and mother visit at least once a month.

Before the commitment offense, Vega was expelled from Garfield High School while in the 11th grade for selling marijuana on campus. He earned his high school diploma while he was in the California Youth Authority (CYA), earning C+ grades.

Vega's employment history is negligible. At the time of the commitment offense, he was unemployed. His only job had been as a delivery worker for M and B Enterprises in Los Angeles, where he worked for three and a half months until November 1984. Aside from that job, he had been a student, supported by his parents.

Vega began using marijuana regularly at age 15, about once every two weeks. At age 16, he began sniffing glue and tried LSD a couple of times. He also began smoking PCP on weekends. He indicated he snorted cocaine twice and tried heroin a few times. He claimed that at the time of the commitment offense, he had been smoking PCP and had drunk three beers. He stated he drank alcohol every weekend, approximately seven beers a night.

Vega's only juvenile offense was the one in 1983 for selling marijuana on campus. The petition was sustained, and he was returned home on probation. He had completed probation by the time of his arrest for the commitment offense.

C. Prison Record

Vega was received at the CYA in September 1985. He was transferred to the Department of Corrections (now the Department of Corrections and Rehabilitation)

(CDC or CDCR) in 1987. His classification score is 19.[5] Vega's custody designation is "Medium A."[6] His disciplinary record includes four "CDC 115" rule violations,[7] the most recent of which was in May 2003, for a prison-wide work stoppage. Two of the CDC 115's were for dangerous contraband (a tattooing device) in 1992 and 1994. In 1991, he received a CDC 115 for embezzlement. He was involved with other inmates in

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[5] "'Prisoner classification scores play a significant role in determining where, within the state's many prison facilities, a prisoner will be sent to serve [his] term of incarceration. [Citation.] As a general rule, a prisoner's classification score is directly proportional to the level of security needed to house the inmate. . . .' . . . [¶] When a male inmate is first received in the prison system, he is housed at a reception center where his case factors are evaluated (i.e., length of sentence, criminal history, behavior during prior and current terms, including escape history) and a standardized system is used to compute a classification score to determine his initial placement in one of the state's prisons or camps. (See [Cal. Code Regs., tit. 15,] §§ 3375.1–3375.3, subd. (a).) The score is recalculated at least yearly and may determine the necessity of subsequent prison transfers. ([*Id.*,] § 3375.4.)" (*In re Player* (2007) 146 Cal.App.4th 813, 823–824.) The mandatory minimum score for a life term inmate is 19. (CDCR, Department Operations Manual (electronic ed. Dec. 31, 2006) Adult Parole Operations, § 61010.11.5, pp. 465–466 <http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/Ch_6_Printed_Final_DOM.pdf> [as of May 5, 2009].) Scores of 52 and above require the highest level of security (level IV). (Cal. Code Regs., tit. 15, § 3375.1, subd. (a)(4).)

[6] The CDCR "uses . . . inmate custody designations to establish where an inmate shall be housed and assigned, and the level of staff supervision required to ensure institutional security and public safety[.]" (Cal. Code Regs., tit. 15, § 3377.1, subd. (a).) At the Medium A custody level, inmates are housed in cells or dormitories within the facility security perimeter; their assignments and activities must be within the facility security perimeter; and their supervision must be "frequent and direct." (*Id.*, subd. (a)(6)(A)–(C).)

[7] A CDC 115 documents misconduct believed to be a violation of law or otherwise not minor in nature. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(3); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

a conspiracy to embezzle funds from the California Prison Industry Authority (PIA)[8] at Donovan state prison. None of the CDC 115's was for violent behavior.

Vega has also received six "CDC 128-A" counseling "chronos,"[9] the last one in 2002 for noncompliance with grooming standards. Three of the CDC 128-A's (one in 1987 and two in 1992) were for disobeying orders. One was for excessive contact during visiting (1995), and another was for reporting late to work (1998).

Vega has upgraded educationally by obtaining his high school diploma while at the CYA. Vocationally, while in prison he completed Vocational Graphic Arts, Vocational Ornamental Horticulture, Vocational Horticulture-Nursery, Vocational Auto Mechanics, Vocational Optical, Vocational Print Shop, Vocational Landscaping, and Auto Mechanics Air-conditioning Repair. He has taken a number of self-help courses and participated in therapy, including Alcoholics and Narcotics Anonymous (AA and NA), Life Plan for Recovery, Breaking Barriers, Parenting, Beyond Anger, Alternatives to Violence, and Anger Management. He received laudatory chronos in 1992 and 2003.

Vega's employment history in prison includes working as a porter in the kitchen (Folsom), working in Recreation and Release (Donovan), optical (Donovan), porter in the yard II building (Donovan), yard crew (Tehachapi), barber (Solano), optical (Solano), and gym porter and porter on facility "C8" yard (Chuckawalla Valley). In addition, Vega was in Vocational Graphic Arts from 1991–1992 and earned a certificate of completion

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[8] The PIA is a state-operated, self-supporting organization that provides productive work assignments for inmates in California's adult correctional institutions, including manufacturing as well as other services, for example, office furniture, clothing, food products, shoes, printing services, signs, binders, eye wear, gloves, license plates, and cell equipment. (<http://www.pia.ca.gov/About_PIA/FastFacts.html> [as of May 5, 2009].)

[9] "The CDC Form 128 series (chronos) are used by staff to provide progress reports on inmates." (CDCR, Department Operations Manual, *supra*, § 72010.7.) A CDC 128-A documents incidents of minor misconduct. (See Cal. Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray*, *supra*, 151 Cal.App.4th at p. 389.)

in 2002. He worked in the furniture assembling factory in August 2002, then in Vocational Landscaping from 2002 to 2005. Vega was facility "C8" first watch porter for six months in 2005, and from September 2005 to December 2006 was facility "C7" second watch porter.

Vega acknowledged his teenage drug use but claimed he had not used drugs or alcohol while in prison.

At the hearing, the deputy commissioner characterized Vega's "ratings [and] work efforts . . . at above-average."[10]

In Vega's 2006 psychiatric evaluation, the psychiatrist rated Vega's institutional adjustment as "excellent," stating: "It appears that [Vega] has made a positive adaptation to prison. The job training and work he has accomplished reflects a high level of motivation. His participation in AA and NA has been outstanding and consistent. Attempts at continuing his education [have] been consistent and he wishes he had the opportunity to enter college while he is in CDC. [Vega] stated that he is active in his evangelical faith as a Christian on a regular basis and has been for the past few years. He attends once a week devotions and church groups and stated that he is reading his bible daily and is currently corresponding with an organization called the Crossroads for completing bible lessons by correspondence. He also indicated that his faith has given him a different perspective on life and hope and he is thankful for his mother's prayer."

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[10] There are no supervisors' reports in the record.

D. Mental Health Evaluations[11] and Insight Into Offense

In Vega's 2006 psychiatric evaluation, the psychiatrist's diagnostic impressions per the DSM-IV criteria were: Axis I: no psychiatric diagnosis; Axis II: diagnosis deferred; Axis III: no diagnosis of physical disorders or conditions at this time; and Axis IV: stresses of incarceration. Vega's GAF score was 90 (on a 100-point scale).

Regarding the commitment offense, the psychiatrist reported that Vega agreed with the psychiatric evaluation submitted in 2003.[12] "[W]hen asked about how he feels about the crime, he became emotional and was on the verge of tears. He felt very bad for his victim and his family and was able to show quite a bit of emotion relative to the event and was expressing a lot of remorse and guilty feelings and expressed willingness to receive forgiveness by the victim's family and by God."

The psychiatrist identified both "low risk" and "high risk" factors in an effort to "evaluate relevant risk factors associated with relapse and reoffense." On the high risk side, Vega has a prior juvenile criminal record; he was an active participant in the offense; he was not facing an immediate threat; the offense resulted in the victim's death; and the victim was highly vulnerable.

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[11] The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders, Text Edition (4th ed. 2000), setting forth all currently recognized mental health disorders and a comprehensive classification system. Generally, the classification system calls for information to be organized into five "axes" or dimensions to assist clinicians in planning treatment and assessing prognosis: (1) clinical disorders, (2) personality disorders, (3) medical conditions, (4) psychosocial and environmental problems, and (5) global assessment of functioning (GAF). (*Id.* at p. 27.) Using a point-scale from 100 down to 1 and organized into 10-point descriptive ranges, e.g., 90–81, 70–61, or 50–41, GAF scoring reflects higher functioning in the higher numbers. (*Id.* at p. 33.) Although we refer to the "DSM-IV" criteria, we recognize that the 2000 text edition of the manual is the authoritative source.

[12] In the 2003 psychiatric evaluation, the psychologist simply quoted Vega's account.

The psychiatrist listed the following low risk factors: "No adult criminal records, no prior felony convictions, no prior misdemeanor convictions, no record of aggression or violence in prison. He has maintained a long-term presence with perfect attendance in AA and NA. Overall adaptation to prison life has been positive and constructive. The offense was not committed during the commission of another crime. The offense does not appear to be premeditated.[13] [Vega] acknowledges that he committed the offense. He fully acknowledges the wrongfulness of his actions and appears to take full responsibility for the offense and does not appear to rationalize or minimize his role. He fully expressed remorse for his actions and was on the verge of tears when a report of the victim was shared with him and appears to feel guilty for his actions and can empathize at an emotional level with the harm done to his victim and the victim's family. [Vega] demonstrated a good awareness of the circumstances that resulted in his committing a serious offense. [Vega] appears highly motivated to undertake constructive changes in his life. He takes pride and extracts power from his faith and the support from his family. He has not been diagnosed as an Antisocial Personality Disorder. Criminal mindedness and criminality did not appear to be primary elements of [Vega's] offense. Circumstantial/situational factors appear to play a significant role in the offense."

The psychiatrist opined that Vega's propensity for violence within a controlled setting was less than that of the average inmate, within the community his propensity for violence would be no greater than that of the average citizen, and he would likely be able to hold his present gains. This opinion is consistent with that rendered in the 2003 psychiatric evaluation.

The record does not contain a 2006 Life Prisoner Evaluation Report (LPER). The Governor stated in his decision that neither the 2005 nor the 2006 LPER assessed Vega's risk to the public. The most recent LPER in the record was prepared for the June *2004*

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13 The Court of Appeal rejected Vega's contention that there was no substantial evidence of premeditation as meritless. (*People v. Vega, supra,* B016026.)

parole hearing calendar. The correctional counselor stated in the summary that "Vega would probably pose a moderate degree of threat to the public at this time, if released from prison. This opinion is based on the fact that Vega's crime involved him stabbing the victim in the neck, killing him, and also making slashing motions at the other victim."[14] The counselor acknowledged Vega's expression of remorse and sorrow for the crime in his version of the offense. The counselor qualified his opinion, stating the "assessment of risk and/or level of dangerousness is generalized and related to [Vega's] performance within a structured correctional environment and does not necessarily represent what his behavior would be like in society." Although the author stated his assessment was based on the commitment offense, he cited other post-conviction factors that appeared to contradict his assessment that Vega posed a "moderate" risk. The counselor noted that Vega had received no CDC 115's since 1994, although he had

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[14] The earlier three LPER's in the record (2000, 2002, and 2003) all state that Vega would probably pose a moderate degree of threat to the public if released on parole. In the LPER for the February 2000 hearing, the correctional counselor stated: "Considering the commitment offense, prior record and prison adjustment, this writer believes Vega would probably pose a moderate degree of threat to the public, at this time, if released from prison." No further explanation is provided. In the LPER for the June 2002 hearing, the author stated: "Considering the commitment offense, prior record and prison adjustment, this writer believes Vega would probably pose a moderate degree of threat to the public at this time, if released from prison. This opinion is based solely on the circumstances of the life crime, his in-custody behavior, and his willingness to try to help himself by continuing to remain disciplinary free, even though in his early years of incarceration he received several in-custody disciplinaries. He has not received a . . . CDC 115[] since 1994, or a . . . CDC 128A[] since 1998. He continues to strive to complete vocational trades and he is active in . . . NA[] and . . . AA[]." The LPER for the 2003 parole hearing expresses the counselor's same assessment that Vega probably posed a moderate degree of threat based on the circumstances of the commitment offense. The counselor noted Vega's expression of remorse and sorrow, the fact he had received no CDC 115's since 1994, his completion of Vocational Landscaping and Vocational Graphic Arts, his involvement in AA and NA, his participation in and completion of a Biblical Counseling Foundation Prison Anger Management Program, his family's financial and emotional support, and his "respectful demeanor" toward all of the staff.

received one for participating in the 2003 work stoppage. Vega had also acquired several trades, continued to be involved in AA and NA, and had family support. Finally, "Vega displays a respectful demeanor toward custody and non-custody staff."

E. Parole Plans

Vega plans to reside with his sister, who works as a nurse at a hospital in Pomona. The psychiatrist reported Vega has several options — residing with his mother, sister, or any one of three aunts.

In the 2006 psychiatric evaluation, Vega's vocational plans were rated excellent: "There are letters in his C-file for several job offers in the community when released. In transportation specifically by one company who will provide him with a job as a driver delivering goods. He also wants to enroll in college with a special interest in obtaining a degree in Computer Science." The psychiatrist described Vega's plans as "active, practical, well planned, realistic and consistent, and he is highly motivated."

One of his job offers was from Metro Valley Auto, for a position as an air conditioning automotive technician. The salary was $550 per six-day week. Another was from Salsido and Sons Construction, offering Vega a position as an apprentice carpenter, as well as work doing plumbing, plastering, drywall, and general labor. The salary was not specified. Yet another job offer was with a transportation company, where Vega would start in the warehouse shipping and receiving department, earning $60 per day.

The psychiatrist described Vega's family support as excellent and noted he had "very good support in the community where he paroles." The Board referred to numerous letters of support during Vega's hearing.

The psychiatrist summed up: "Overall, [Vega's] parole discharge plan is rated excellent."

F. District Attorney's Position on Parole

The district attorney commended Vega on his accomplishments in prison, then stated: "What he has not done is to, in my view, . . . deal candidly and accurately and truthfully with his criminal behavior, that he indeed was there, he knew why he was

there, and he was there waiting for her to come home with the intention of making good on the threats that he had made, and that is that he would kill her and he would kill her date." Vega thus remained a threat to public safety, and the district attorney opposed parole on that basis. The Los Angeles County Sheriff's Department opposed parole based on the commitment offense.

G. Board's Decision

At the parole suitability hearing on June 7, 2007, the Board found Vega suitable for parole and found he "would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." Vega's term was calculated as 314 months.

H. Governor's Decision

On October 8, 2007, Governor Arnold Schwarzenegger reversed the Board's grant of parole. He cited the positive factors in Vega's rehabilitation but decided that the gravity of the commitment offense, Vega's failure to accept full responsibility for his actions, and his prior acts of violence, gang involvement, and drug and alcohol use weighed against parole suitability.

With respect to Vega's failure to accept responsibility, the Governor pointed to the Court of Appeal opinion, specifically the court's rejection of Vega's contention that there was insufficient evidence of premeditation. The Governor quoted Vega's *2004* parole suitability hearing to show that Vega continued to deny his offense was premeditated. In particular, the Governor quoted Vega's testimony that he had not meant to attack Garcia and "'wasn't really aiming for anything.'" Vega said he never meant to hurt Garcia and did not try to stab Sandoval. The Governor also quoted Vega's 2004 testimony that he had not previously threatened to "'get'" Yvonne and kill her date if she went out with someone else.

The Governor found Vega's history of criminal behavior, "which includes acts of violence, gang involvement, and drug and alcohol use, weighs against his parole suitability at this time." Relying on the CYA referral document and the probation report, each of which was prepared 22 years before the 2007 hearing, the Governor quoted

Vega's description of himself *before the crime* as "'violent, someone who got into a lot of fights, was on PCP almost every other day . . . , was constantly frustrated, . . . [and] was always angry with Yvonne.'" The Governor did not include the following sentence from the CYA referral document: "Since [Vega's] incarceration, he indicates that he is back to religion, is able to control his temper, forgave Yvonne, can talk to people, can read without getting mad, and is overall better off than before." The Governor did not state he had any reason to believe that any of the cited criminal behaviors had continued in the intervening 22 years. History alone weighed against Vega's parole suitability.

The Governor also expressed concern about the risk assessments, noting that the two most current LPER's (2005 and 2006) did not provide any risk assessment, but that *earlier* LPER's — going back as far as seven years — had opined that Vega would "probably" pose a "moderate" degree of threat to the public if released. He dismissed the mental health professionals' assessments — which stated Vega's propensity for violence would be no greater than that of the average citizen and which were based on a two-hour interview with Vega, review of his central file, and review of his medical records — in favor of the outdated LPER's, which were based on more than one interview with Vega, interviews with his housing unit officers, and an interview with one of his vocational instructors, as well as a review of his central file. Thus, the Governor stated, "after carefully considering the very same factors the Board must consider, I find that the gravity of the murder committed by Mr. Vega, along with his record of criminal behavior, the evidence indicating that he may not fully accept responsibility for the crime, and concerns about his recent risk assessments, presently outweigh the positive factors."

I. Habeas Corpus Proceedings

Vega filed a petition for a writ of habeas corpus in the Los Angeles County Superior Court on May 7, 2008. The superior court concluded the record contained "some evidence" to support the Governor's decision that Vega was unsuitable for parole "because of the aggravated nature of the commitment offense and the evidence that

[Vega] lacks insight or minimizes his role in the commitment offense" and denied the petition on July 1, 2008.

Vega filed his petition for a writ of habeas corpus in this court on September 15, 2008. We requested opposition, issued an order to show cause, and set a briefing schedule. The matter was argued and is now ready for decision.

DISCUSSION

Vega contends the Governor, in his reversal of the Board's decision finding him suitable for parole, failed to establish a nexus between the commitment offense and the conclusion that Vega currently poses an unreasonable risk of danger to society if released on parole. We agree.

A. Governing Law

The purpose of parole is to help prisoners "reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [92 S.Ct. 2593].) Although a prisoner has no constitutional or inherent right to be conditionally released before the expiration of his sentence (*Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 7 [99 S.Ct. 2100]), in this state Penal Code section 3041 creates in every inmate a cognizable liberty interest in parole, and that interest is protected by the procedural safeguards of the due process clause. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 ["petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation'"], quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664; *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 914–915.)[15]

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[15] All references to section 3041 are to that section of the Penal Code. Section 3041, subdivision (a), provides as relevant: "One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will

Section 3041, subdivision (b), establishes a presumption that parole will be the rule, rather than the exception, providing that the Board "shall set a release date unless it determines that the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed . . . ." (See *Board of Pardons v. Allen* (1987) 482 U.S. 369, 377–378 [107 S.Ct. 2415] [unless designated findings made, parole generally presumed to be available].) "[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1211; *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846, 851 [section 3041 vests "California prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause"].)

When assessing whether a life prisoner will pose an unreasonable risk of danger to society if released from prison, the panel considers all relevant, reliable information available on a case-by-case basis. The regulations set forth a nonexclusive list of circumstances tending to show suitability or unsuitability for release. (Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d).) Factors tending to indicate suitability include: (1) the absence of a juvenile record, (2) a stable social history, (3) signs of remorse, (4) significant life stress motivated the crime, (5) battered woman syndrome, (6) no significant history of violent crime, (7) the inmate's age, (8) realistic plans for the future, and (9) institutional behavior. (*Id.*, subd. (d).) Circumstances tending to show

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provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime."

unsuitability include: (1) the commitment offense was committed "in an especially heinous, atrocious or cruel manner,"[16] (2) a previous record of violence, (3) an unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) serious misconduct while incarcerated. (*Id.*, subd. (c).) "In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety . . . ." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1205.)

The "core determination" thus "involves an assessment of an inmate's *current* dangerousness." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1205, original italics.) The Board is authorized "to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.'" (*Id*. at pp. 1205–1206, quoting *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 655.) "[D]irecting the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1219.) As a result, the "statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of

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[16] The regulation specifies the factors to be considered in determining whether the offense was committed in an especially heinous, atrocious or cruel manner as: "(A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

rehabilitation and no other evidence of current dangerousness." (*Id.* at p. 1211.) The Board can, of course, rely on the aggravated circumstances of the commitment offense, among other factors, as a reason for finding an inmate unsuitable for parole; however, "the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his . . . current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his . . . commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Id.* at p. 1214, original italics.)

The same standards applicable to the Board apply to the Governor. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258.) While the Board and the Governor must consider the same factors, "the Governor undertakes an independent, de novo review of the inmate's suitability for parole." (*Ibid.*) The Governor may weigh the factors differently from the Board and draw contrary conclusions. (Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d).)

B. Standard of Review

"[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212, original italics.) The standard is "unquestionably deferential" and "'limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision.'" (*Id.* at p. 1210.) Nonetheless, the standard "certainly is not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision — the determination of current dangerousness." (*Ibid*.) Our inquiry thus is "not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light

of the full record before the Board or the Governor." (*Id.* at p. 1221, original italics.) The Board or the Governor must articulate a "rational nexus" between the facts of the commitment offense and the inmate's current threat to public safety. (*Id.* at pp. 1226–1227 [finding no evidence supported Governor's determination that Lawrence remained a threat to public safety in view of her "extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board"]; *In re Ross* (2009) 170 Cal.App.4th 1490, 1497 [Governor's written decision flawed because it contained no explicit "'articulation of a rational nexus between th[e] facts and current dangerousness'"].)

C. Analysis

Unlike *Lawrence*, here the Governor's reversal was not based solely on the commitment offense. The gravity of the murder was certainly the foremost consideration for the Governor. ("The gravity of the first-degree murder . . . would alone be sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk.") But the Governor also considered Vega's "record of criminal behavior, the evidence indicating that he may not fully accept responsibility for the crime, and concerns about his recent risk assessments," which the Governor believed outweighed the positive factors. Reliance on the aggravated circumstances of the commitment offense, as well as the other factors cited in the Governor's decision, is proper, but there must be "something in the prisoner's pre- or post-incarceration history, or his . . . current demeanor and mental state, indicat[ing] that the implications regarding the prisoner's dangerousness that derive from his . . . commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra,* 44 Cal.4th at p. 1214.)

Here, the Governor "questioned" Vega's acceptance of responsibility but failed to articulate the nexus between his "question" and his conclusion that Vega posed an unreasonable risk of danger to the public if released on parole. Similarly, the Governor

stated that Vega's "history of criminal behavior, which includes acts of violence, gang involvement, and drug and alcohol use, weighs against his parole suitability at this time." But as noted, the Governor relied on Vega's self-description of 22 years ago and ignored the very next sentence in that description contradicting Vega's stated view of himself as a violent man, as well as Vega's conduct in prison. And more important, the Governor failed to state a connection between decades-old behavior and Vega's current dangerousness. The nexus is not self-evident, and with the passage of so much time and Vega's exhaustive rehabilitative efforts, the statements in the CYA referral document and the probation report make the connection even more tenuous.

Finally, the Governor's "concern[]" about Vega's risk assessments does not substitute for the requisite nexus. Instead, he rejects current psychiatric evaluations, written expressly — by experts — to include assessments of both high and low risk factors, which concluded that Vega's propensity for violence would be no greater than that of the average citizen, in favor of outdated LPER's containing unqualified statements about risk. The Governor fails to specify why and how the distinctions he makes among and between the reports establish that Vega currently poses an unreasonable public safety risk.

In sum, the Governor fails in his reversal decision to articulate any reason why the factors and evidence he cites show that Vega remains a public safety risk, 23 years after the commitment offense. In a case such as this, "in which the record is replete with evidence establishing petitioner's rehabilitation, insight, remorse, and psychological health, and devoid of any evidence supporting a finding that [he] continues to pose a threat to public safety — petitioner's due process and statutory rights were violated by the Governor's reliance upon the immutable and unchangeable circumstances of [his] commitment offense" in denying him parole. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1227.) We conclude that, just as in *Lawrence*, there was no evidence in the record to establish that Vega's parole currently poses a threat to public safety. His rights were violated by the Governor's failure to articulate the requisite nexus between the factors he relied on and his conclusion that releasing Vega from prison would pose an unreasonable

risk of danger to public safety. We therefore vacate the Governor's decision and reinstate the Board's decision.

DISPOSITION

The petition for a writ of habeas corpus is granted. The Governor's October 8, 2007 decision is vacated, and the Board's June 7, 2007 decision is reinstated.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.